

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1065

Cir. Ct. No. 2013CV666

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOSEPH M. OBOIKOVITZ AND VICKI A. OBOIKOVITZ,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL MORAN, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joseph and Vicki Oboikovitz appeal an order granting American Family Mutual Insurance Company's motion for summary judgment and dismissing the Oboikovitzes' complaint. The Oboikovitzes argue summary judgment was inappropriate because there are genuine issues of material

fact concerning “collapse” coverage under their insurance policy.¹ We reject the Oboikovitzes’ argument and affirm.

BACKGROUND

¶2 This suit arises from the defective construction of the Oboikovitzes’ home. The Oboikovitzes purchased a lot and planned home from Brown Builders in September 2002. The builder completed the home in April 2003. The home suffered numerous damages from 2003 through 2011, including cracks in the foundation, walls, flooring, and exterior cement pad. However, the only damage relevant to this appeal is that which occurred during the period of construction.

¶3 The Oboikovitzes identified two instances of damage that occurred during construction. First, there was a “thin crack” that appeared in the exterior concrete driveway pad near the overhead garage door, at the northeast corner of the home. The builder patched the crack during construction, and the Oboikovitzes continued patching it through the years.

¹ The Oboikovitzes further argue there are genuine issues of material fact concerning whether American Family had a reasonable basis to deny coverage. Because we conclude there was no coverage in the first instance, we need not also address whether it was reasonable to deny coverage. The parties also address whether other policy exclusions would have barred coverage. We need not reach those arguments either. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶4 Second, there was a crack in the foundation floor of a bedroom in the southeast corner of the basement.² The Oboikovitzes reported they first discovered that crack in 2005, when “a bump in the floor of the southeast bedroom became evident while walking in the room.” They further explained:

At the time, we thought that there was a tool left underneath the carpeting or the padding was bunched. This crack has since traveled diagonally across the room, and became more noticeable within the last 2 years. The crack seems to be a drop in the floor of 1/4-1/2 inch or more. It is possible that the crack may have been hidden by a bed that was moved out 3 years ago.

The Oboikovitzes’ description of the two cracks was presented in an undated “home damage timeline,” which lists March 2011 as the latest date of damage noted.

¶5 The Oboikovitzes retained an engineering firm in 2012 to conduct a geotechnical distress evaluation of their home. The engineering expert, Anthony Giles, set forth the following “cursory background information” in his report:

Structural problems began before the home was completed, according to the Homeowners. A crack that developed within the floor slab of the southeast basement-bedroom is an indication that structural problems started during construction and continued after completion of the Residence. It is understood that during construction Brown Builders ... patched the floor-slab crack within the ... bedroom, before carpet was installed. But the crack

² The circuit court’s summary judgment decision only recognized the existence of a single “thin crack” during the construction period. However, the confusion likely stems from the Oboikovitzes’ own failure to clearly articulate the facts. Their March 7, 2014 surreply brief in the circuit court erroneously both referred to the basement bedroom crack as the “thin crack” and indicated it was in the northeast portion of the home. The brief further erroneously indicated the exterior concrete pad crack was located at the northwest portion of the home. The Oboikovitzes then failed to bring the issue to the circuit court’s attention in their motion for reconsideration. Regardless, as we discuss later, the Oboikovitzes’ expert opinion concerned only the basement bedroom crack, and the driveway crack is irrelevant.

worsened with time and [the Oboikowitzes later noticed a bump in the floor].

To observe the floor crack in the southeast basement-bedroom, carpet was lifted at the request of [Giles]. Mr. Giles observed the crack during his first Site visit on August 10, 2012. The crack extended from the east wall to the south wall The width of the crack varied and appeared to be up to about 3/4-inch to 1 inch wide, or slightly wider. ... Because the crack follows the patch material that was reportedly applied during construction, the existing crack is considered to be a progression of the crack that developed during construction. The floor-slab crack and the patch material are shown in photographs in the appendix.^[3]

The report discusses additional structural problems, but the only other issue reportedly existing during construction was the driveway crack.

¶6 Giles ultimately determined the home's structural problems were caused by improper site preparation; fill materials; and placement, compaction, and control of fill materials. Giles opined the residence was inadequately supported and the slope was unstable. Further, the "caution and risk" section of the report stated:

The Residence and slope are likely in a state of failure which appears to have started at the time of construction. Additional structural problems with the Residence should be expected. ... Failure and collapse of the Residence is possible; failure of the slope is also possible. Failure of the Residence and slope could be sudden and catastrophic.

³ The Oboikowitzes' March 7, 2014 surreply brief in the circuit court attached three color photographs of the basement bedroom crack and one photograph of the driveway crack, all from the Giles report. A thin grey patch material is visible on the surface of the basement bedroom floor, along either side of the entire length of the portion of the crack that is shown.

However, the report described the “scope of services” as follows:

Giles conducted the Geotechnical Distress Evaluation to identify a likely geotechnical-related cause or causes of the structural problems experienced by the Residence. For this report, “structural problems” is a generic term used to collectively and generally describe the results of apparent excessive movement of the Residence, including apparent excessive downward movement and apparent excessive lateral movement.

Giles did not evaluate, determine, or confirm the structural integrity of the Residence or any component, system, or part of the Residence; those services are recommended to be done by a qualified structural engineer Furthermore, Giles did not assess the Residence to estimate needed repairs or to estimate the remaining service life of components, systems, or parts of the Residence.

¶7 American Family Mutual Insurance Company issued the Oboikovitzes a homeowners’ insurance policy that was in effect during the construction of their home. It provided the following “collapse” coverage:

1. **Collapse.** We cover risk of direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

....

f. use of defective material or methods in construction, reconstruction, renovation or remodeling if the collapse occurs during the course of the construction, reconstruction, renovation or remodeling.

....

Collapse does not include settling, cracking, shrinking, bulging or expansion.

¶8 After American Family refused to provide coverage under the policy, the Oboikovitzes commenced a tort claim for insurance bad faith. American Family moved for a stay and for summary judgment, arguing the

Oboikovitzes would be unable to prove an underlying breach of contract. American Family contended no collapse occurred at all, but if it did occur it was not during construction.

¶9 The circuit court granted American Family’s summary judgment motion. It concluded there was sufficient evidence of a present collapse, as that term is interpreted by case law. However, it determined the Oboikovitzes could not show that any collapse occurred during construction. The court explained:

The most the Oboikovitzes can show is that the house is currently in a state of collapse and that its current state was caused by defective materials and methods of construction.

...

Certainly, the cause of the Oboikovitzes’ problems relates back to the construction of the home. But the policy language required not only that the causal events occurred during construction; the policy required that the house’s collapse—the material impairment of its “basic structure and substantial integrity”—must also have occurred during construction. And it did not, not under any reasonable view of the facts. Consequently, the Oboikovitzes cannot show an underlying breach of contract to support their bad faith claim.

¶10 The Oboikovitzes moved for reconsideration and appended an affidavit from Giles summarizing the opinions from his report. They argued that the court misconstrued the evidence when it concluded the collapse occurred only after construction and that, properly understood, the evidence at least raised a factual dispute about the timing of the collapse. The court denied the motion, and the Oboikovitzes appeal.

DISCUSSION

¶11 The Oboikovitzes argue summary judgment was inappropriate because there are genuine issues of material fact concerning “collapse” coverage

under their insurance policy. Thus, the Oboikovitzes contend they sufficiently demonstrated American Family breached the insurance contract and they are therefore entitled to proceed with their bad faith claim.

¶12 Summary judgment is appropriate when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08.⁴ When determining whether there are genuine factual issues, the facts must be viewed in the light most favorable to the nonmoving party. *Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We review grants of summary judgment de novo. *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

¶13 In *Brethorst v. Allstate Property and Casualty Insurance Co.*, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467, the court set forth the procedure for addressing a tort claim of bad faith when the underlying breach of contract claim is time barred. The court determined that “some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured.” *Id.*, ¶65. Thus, it concluded:

[T]he insured may not proceed with discovery on a first-party bad faith claim until it has pleaded a breach of contract by the insurer *as part of a separate bad faith claim* and satisfied the court that the insured has established such a breach or will be able to prove such a breach in the future.

Id., ¶76. “A plaintiff’s failure to make this preliminary showing would be grounds for the court to grant a motion for summary judgment” *Id.*, ¶79. “The court

⁴ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

must be satisfied that the claimed breach of contract is well founded and can be proved in the future.” *Id.*, ¶81.

¶14 Regarding “collapse,” Wisconsin has adopted the “more liberal line of authorities generally holding there can be a collapse within the meaning of an extended coverage insurance policy although there is no falling, tumbling down or reduction to rubble of the building or the part thereof” *Thornwell v. Indiana Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 347-49, 147 N.W.2d 317 (1967). When considering whether a whole building is collapsed, the standard is that “the building’s basic structure and substantial integrity as a building must be destroyed or materially impaired to constitute a collapse.” *Id.* at 348. To satisfy that standard, the damage need not render the building unsuitable for use as a dwelling. *Id.*

¶15 American Family does not dispute that a collapse of the Oboikovitzes’ home occurred.⁵ Rather, it argues the circuit court correctly determined the Oboikovitzes failed to allege facts that could support a finding that a collapse occurred during construction, as required for policy coverage. We agree that, as a matter of law, the Oboikovitzes cannot show there was a collapse during construction.

¶16 The Oboikovitzes rely on the cautionary statement in Giles’ report that the “residence and slope are likely in a state of failure which appears to have

⁵ American Family states in a footnote that while it opts not to address the issue, it does not concede there was ever a collapse. For our purposes, an undeveloped assertion of nonconcession is no different than failing to respond to the Oboikovitzes’ argument. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

started at the time of construction.” However, as the report acknowledged, Giles could not give an opinion concerning the “structural integrity of the Residence” because he did not conduct any such evaluation and he was not a structural engineer.

¶17 Regardless, the only evidence of any damage existing during the time of construction was the “thin crack” in the concrete driveway pad and the patched crack that was later discovered under the basement bedroom carpet. First, we fail to see how the exterior driveway crack had any bearing on the then-existing integrity of the house structure, and the Oboikovitzes provide no explanation. Indeed, Giles’ affidavit that was filed with the reconsideration motion refers solely to the basement bedroom floor crack.

¶18 Second, we agree with the circuit court that, as a matter of law, the single crack in the basement floor was woefully inadequate to show the whole home’s “basic structure and substantial integrity as a building [was] destroyed or materially impaired.” See *Thornwell*, 33 Wis. 2d at 348. There was no evidence or allegation that any patch material was placed inside an existing large crack, and the photographs appear only to show a thin surface patch. Further, the Oboikovitzes did not notice the “bump” from the worsening crack for several years after construction. No layperson could reasonably conclude that such a crack in just one bedroom of a basement constituted a “collapse” during construction under *Thornwell*, and the Oboikovitzes offered no expert testimony to that effect.

¶19 Even if we were to consider the additional opinions set forth in Giles’ postsummary judgment affidavit, his averments do not meet the *Thornewell* standard.⁶ Giles stated:

[I]t is my opinion that the structural problems began during construction and were caused by excessive movement of fill materials that were placed to construct the residence.

....

It is my opinion, based on the Geotechnical Distress Evaluation, that the residence is in a state of failure, that the structural problems indicate that the residence is materially impaired, and that the material impairment occurred during construction.

The purported “state of failure” or “material impairment” of the “residence,” in isolation, do not address whether the home’s “basic structure and substantial integrity as a building” were “materially impaired”—either at the time of evaluation or during construction.

¶20 Because the Oboikovitzes failed to show they could prove the house collapsed during construction, they could not satisfy the *Brethorst* requirement that an underlying breach of the insurance contract occurred. *See Brethorst*, 334 Wis. 2d 23, ¶76. Accordingly, the circuit court properly granted summary judgment dismissing the Oboikovitzes’ bad faith claim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁶ American Family did not object to the supplemental affidavit, but the circuit court’s reconsideration motion does not evidence any consideration of its contents.

